

ARKANSAS SUPREME COURT

No. CR 05-884

NOT DESIGNATED FOR PUBLICATION

MELVIN EUGENE FINLEY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered

May 11, 2006

APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY, CR 2000-4277,
HON. TIMOTHY DAVIS FOX, JUDGE

AFFIRMED

PER CURIAM

A jury found appellant Melvin Eugene Finley guilty of a terroristic act, first-degree battery, and possession of a defaced firearm, and, in the same proceeding, the trial court found appellant guilty of the charge of possession of firearms by a felon. Appellant received an aggregate sentence of 648 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment on appeal. *Finley v. State*, CACR 03-737 (Ark. App. November 10, 2004). Appellant timely filed a petition for relief pursuant to Ark. R. Crim. P. 37.1, which was denied without a hearing. Appellant now brings this appeal of the order denying postconviction relief.

Appellant raises two points on appeal, summarized as follows: (1) the trial court erred in finding trial counsel was not ineffective for failure to call certain witnesses in order to attack the victim's character and bolster the credibility of appellant at trial; (2) the trial court erred in finding trial counsel was not ineffective for failure to introduce medical records and pictures showing that

appellant had been shot by the victim. As to the first point, the trial court found that appellant had failed to provide a summary of the testimony that one witness would have provided, and that the other witness, Mary Finley, could only testify as to an altercation prior to the incident resulting in the charges against appellant. The court noted that the decision of whether to call a witness is generally a matter of trial strategy, and found that appellant had not shown that the decision reached would have been different absent any error or that appellant had been prejudiced. As to the second point, the trial court found that there was evidence introduced at trial that the victim shot at appellant, and that there was no argument at trial that appellant had not been shot by the victim. The court determined that it was not error for counsel to fail to rebut a point that was conceded, and that evidence on the point would not have changed the outcome of the trial.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

In an appeal from a trial court's denial of a petition pursuant to Ark. R. Crim. P. 37.1, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). To prevail on a claim of ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient, with errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and second, the defendant must also show that this deficient

performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 38, 26 S.W.3d at 125. To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., that the decision reached would have been different absent the errors. *Id.* In the order denying postconviction relief, the trial court found that appellant had failed to overcome this presumption on both points. We agree.

Appellant asserts trial counsel was ineffective for failure to call two witnesses, Mary Finley and another witness, who would corroborate appellant's testimony concerning the collection of rent and would contradict the victim's testimony concerning how often he saw appellant. Appellant further asserts that the trial court erred in not holding a hearing on this point. An evidentiary hearing should be held in a postconviction proceeding unless the files and the records of the case conclusively show that the prisoner is entitled to no relief. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). The trial court has discretion pursuant to Ark. R. Cr. P. 37.3(a) to decide whether the files or records of the case are sufficient to sustain the court's findings without a hearing. *Greene*, 356 Ark. at 66, 146 S.W.3d at 877.

We cannot say the trial court abused that discretion in determining the petition and record were sufficient to support its findings. The trial court correctly determined that appellant did not provide a summary of the second witness's testimony in his petition. This court does not grant postconviction relief for ineffective assistance of counsel where the petitioner fails to show what the omitted testimony or other evidence was and how it would have changed the outcome. *Camargo*

v. State, 346 Ark.118, 55 S.W.3d 255 (2001).

Furthermore, even had the witness's testimony supported appellant's allegations concerning the rent and how often the victim saw appellant, we cannot say, from the evidence in the record, that the trial court was clearly erroneous in determining that appellant failed to show that the testimony would have raised a reasonable doubt respecting guilt. The objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice which denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987). An attorney's decision not to call a particular witness is largely a matter of professional judgment, and the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not, itself, proof of counsel's ineffectiveness. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001).

Appellant argues that credibility was key to the decision here, but the victim's credibility was much less of an issue than was appellant's credibility concerning his contention that he went to the victim's home without any intention to use the gun that he carried and that he only fired in self-defense. Even if the jury had not believed the victim was truthful in testifying that he did not fire first, a successful defense would require that the jury believe that appellant was not acting as the aggressor. In light of the felony conviction used on cross examination to impeach appellant, and that he admitted that he left the victim's house and then returned with the gun, the second witness's testimony, even if it clearly supported appellant's allegations concerning the rent and how often the victim saw appellant, was unlikely to have altered the outcome.

As the trial court found, Mary Finley did not testify in the affidavit provided as to the events after appellant returned to the victim's house with the gun; she could only testify concerning some

of the events leading up to the exchange of gunfire. Her testimony as shown in her affidavit would not have provided any significant support to appellant's claim of self defense. The trial court did not err in finding that the petition and the record did conclusively show that the prisoner was entitled to no relief, in that appellant had not shown that counsel's failure to call Mary Finley prejudiced appellant or that her testimony would have raised a reasonable doubt respecting guilt.

As for appellant's second point of error asserting that trial counsel was ineffective for failing to introduce evidence that appellant had been shot by the victim, the trial court correctly found that it was not contested at trial that the victim shot towards appellant. Various evidence supported that point. In addition, the victim did not deny having hit appellant when he fired towards him, and there was no argument that appellant had not actually been injured by the shot. Appellant has not shown that the introduction of further evidence could have impeached the victim or otherwise altered the outcome. Because appellant failed to show prejudice or overcome the strong presumption of reasonable professional assistance, we cannot say that the trial court was clearly erroneous in denying postconviction relief.

Affirmed.